OPEN AND PUBLIC MEETINGS

1. **Where is the Utah law on open and public meetings?**
   Utah Code 52-4-1 through 52-4-9.

2. **What entities or groups are subject to the public and open meetings requirements?**
   Open meetings laws generally require that the meetings of a "public body," including workshops and executive sessions, be open to the public. Definitions of "public body" are often defined in state statute, but there is usually no question but that they apply to public education governing boards. (established by a 1976 Michigan case, *School Dist. v. Shulman*, 243 N.W.2d 673) The applicable Utah statute includes "administrative, advisory executive, or legislative bod[ies] of the state or its political subdivisions," requires that there be two or more persons, requires expenditure, disbursement or support by tax revenue and "is vested with the authority to make decisions regarding the public's business." The following, in other states, have been held **not** subject to open meetings laws:

   - advisory committee that was "purely fact-finding, informational, recommendatory or advisory, with no decision-making authority (*Fain v. Faculty of College of Law*, 552 S.W.2d 752)
   - athletic committee or task force (higher education–*A.S. Abell Publishing C. v. Board of Regents*, 514 A.2d 25, Md. 1986)
   - employee search or selection committee (*Knox v. District Sch. Bd. of Brevard*, 821 so.2d 311, Fla. 2002)
   - staff or faculty senates, committees, groups or meeting (Knox–cited above)
   - employee dismissal or discipline
   - employment policies and practices (*Gosnell v. Hogan*, 534 N.E.2d 434, 1989)
   - informational meetings (*Paulton v. Volkmann*, 415 N.W.2d 528, WI, 1987)

   Groups/committees subject to open meetings laws:

   - athletic association or council (cases all involved higher education associations–*Greene v. Athletic Council of Iowa State Univ.*, 251 N.W.2d 559, 1997)
   - board of educational institution (*Floyd Co. Bd. of Educ. v. Ratliff*, 955 S.W.2d 921, Ky. 1997)
   - board member committees composed of less than a board quorum (*Schmiedicke v. Clare Sch. Bd.*, 577 N.W.2d 706, Mich. 1996)
   - employee search or selection committee (*Connelly v. School Comm. of Hanover*, 565 N.E.2d 449, Mass. 1991)
   - staff or faculty senates, committees, groups or meetings (higher education--*Perez v. City Univ. of N.Y.*, 753 N.Y.S.2d 641, 2002)
   - board member retreat, including a school reorganization (*Neese v. Parish Special Sch. Dist.*, 813 S.W.2d 432, Tenn. 1990)
   - curriculum meetings (*Frazer v. Dixon* 22 Cal.Reptr. 2d 641, 1993)

3. **Do local school boards and the State Charter School Board meet the definition of "public body?"**
   Yes

4. **What "notice" of a public meeting is required under Utah law?**
   An annual notice of the board's meeting schedule if meetings are held regularly over the course of a year **and** 24 hours public notice of the: (a) agenda, (b) date, (c) time, and (d) place of each meeting.

   Public notice is satisfied by posting a notice of the meeting at the principle office of the public body **and** providing notice to at least one newspaper of general circulation within the geographic

jurisdiction. The law also encourages posting notice on the entity's website.

Emergency meetings may be held with notice as "practicable" only following an attempt to notify all board members and receive affirmative votes for the meeting from the members.

5. **Are all local school board/local charter school board meetings public meetings?**
No, chance and social meetings are exempted; meetings may be closed for legitimate designated purposes (see 52-4-7.5); and the definition of "public meeting" does not include a meeting convened for implementation of administrative matters not requiring formal action **and** for which no public funds are appropriated in the course of the meeting.

6. **For which designated purposes are closed meetings legal?**
(a) "the discussion of the character, professional competence, or physical or mental health of an individual;
(b) "strategy sessions to discuss collective bargaining;"
(c) "strategy sessions to discuss pending or reasonably imminent litigation;
(d) "strategy sessions to discuss the *purchase, exchange, or lease* of real property when public discussion of the transaction would disclose the appraisal or estimated value of the property and prevent completion of the transaction on the best possible terms for the public entity;
(e) "strategy sessions to discuss the *sale* of real property that would disclose designated information, prevent the public entity from completing the sale on the best possible terms and when the terms of the sale will be publicly disclosed before the public body approves the sale;
(f) "discussion regarding the deployment of security personnel, devices, or systems;
(g) "investigative proceedings regarding allegation of *criminal* misconduct." (emphasis added throughout).

7. **Must the agenda include all items of discussion in the meeting?**
The agenda must be sufficient to apprise the public of the intended discussion. Specific is better than general. Courts are not sympathetic to "gimmicks" intended to circumvent adequate notice of public meetings. The public body may not take final action on any topics that are not posted on the agenda.

8. **How specific must the description for the purpose of the closed (executive session) meeting be?**
Specificity is not required; balance is necessary between informing the public about executive session activities while not compromising the privacy interests of those whose business is discussed. For instance, a board member can move to close a meeting for the purpose of discussing "the competence of personnel." No need to identify the names or positions that will be discussed.

9. **Can Board action be taken in a closed meeting?**
No, the Utah statute would have to expressly allow for this–and it does not. Where action is taken in an open session, after a closed session, the motion need not present sensitive issues discussed in the closed session. A motion to discharge a named teacher "for reasons authorized by law" has been considered adequate.

10. **Must public meetings be recorded?**
Yes. Written minutes and a digital or tape recording shall be kept of all **open** meetings with a few exceptions. Closed meetings ***must*** also be recorded and written minutes may be kept. The recording shall include:
(a) date,
(b) time,
(c) place,
(d) names of members present and absent,
(e) substance of all matters proposed, discussed or decided,

(f) record, by individual, of votes taken,
(g) names of all citizens who attended and substance of their testimony, and
(h) any information that a **member** requests be included in the minutes.

Closed meetings must be recorded ***unless*** the meeting is closed to discuss indirect personnel matters.

11. Are telephonic meetings public meetings?
They may satisfy open meetings requirements if held in such a way that public disclosure and discourse is possible. Some states, by statute, however, require a quorum to be physically present or find that such meetings violate sunshine laws. The better approach is to have a board by-law if such meetings are commonplace. State law requires that a policy be in place before electronic meetings are held.

12. Are the minutes a public record?
Open meetings statutes generally require that minutes be kept. The Utah statute requires that written minutes and a digital/tape recording be kept of all open meetings. Utah statute requires that minutes be available "within a reasonable time after the meeting." Public bodies usually require the board to approve the minutes as presented by the board secretary. Approval involves giving "formal sanction to" or "to confirm authoritatively" some action (Black's Law Dictionary)

The minutes and records of education governing board meetings are usually considered the best means of proving and finalizing the action of the board. A "public board speaks only through its minutes, written record of resolutions, directions, or actions. Action by a public board is not final until such a written record is made and approved." (*Popson v. Danbury Local Schs. Bd. of Educ.*, 787 N.E.2d 686.) In Utah, minutes of board of education meetings are considered "drafts," and not available under public records laws, until approved by the originating board. Written minutes are the official record of an open meeting.

13. May someone in the audience record the meeting?
Yes, as long as the recording ". . .does not interfere with the conduct of the meeting."

14. What about a record of closed meetings?
If the purpose of the closed meeting is to discuss the character or competence of an individual or the deployment of security devices, the presiding officer need only sign a sworn statement affirming the purpose. (A sample/model affidavit follows this Q and A) A meeting closed for any other purpose requires an electronic recording. The body may also take "detailed written minutes." The law provides no express definition of "detailed." The Websters Dictionary definition of "detailed" provides: "marked by abundant detail or by thoroughness in treating small items or parts."

15. What "detail" satisfies the Utah requirement for "detailed written minutes?"
A recent Attorney General opinion summarized Utah case law to say that "minutes need not be a verbatim transcript, but . . . must be more than the mere place, date, time and names required to be released to the public. Rather, the minutes should be detailed enough for the appropriate judge to review them in camera to determine the facts of the proceedings, i.e. the substance of what was discussed and what transpired, and to determine the legality of the meeting."

16. What if a board wants to have a closed-meeting interview for an individual to fill a board member position?
Interviews to fill an **elected** position cannot be held in a closed meeting. Appointed, employment decisions could be discussed in closed meetings.

17. If meetings must include the public, must individuals be allowed to make comments or have discussion during the meeting?

No, public participation in the meetings continues to be a matter within the discretion of the board. Thus, unless bylaws or board rules require it, a board need not receive public comment during its meetings and may confine public discussion to specified subject matters under prescribed limitations.

Rules regarding public comment must be content-neutral and boards have the unqualified right to control disruptive conduct. Board members themselves have greater rights to be heard and probably to express themselves forcefully without being excluded from a board meeting.

18. What provisions must be made for individuals with disabilities?

The board must ensure that the disabled may effectively participate in or attend meetings. This obligation would apply whether the disabled person is a member of the board or a member of the public entitled to attend.

19. What is the effect of noncompliance with public meetings laws?

The general view is that actions taken at a meeting where open meetings law are violated are voidable, not usually invalid. In subsequent court action, courts tend to ignore harmless failure to comply strictly with open meetings laws. Boards are typically allowed, following full compliance with public meeting notice and the law, to reaffirm or reapprove their actions. Open meetings laws may provide other penalties by statute including injunctions against further violations, criminal penalties (*Tovar v. State*, 978 S.W.2d , TX, 1998–upholding conviction where board president called and participated in an impermissible closed meeting; six month prison sentence, $500 fine) Knowing and intentional violations may have more draconian consequences. In Utah, it is a Class B misdemeanor to knowingly or intentionally violate closed meeting provisions.

20. What should and could be done when a board member has a conflict of interest?

A conflict of interest is a real or seeming incompatibility between one's private interests and one's public or fiduciary duties. Note that an actual conflict of interest is not required, only a potential for conflict. Also, the conflict must not be shared by members of the public generally. (*Friends Retirement Concepts v. Board of Educ.*, 811A.2d 962, N.J. 2002) The determination of whether a particular interest is sufficient to disqualify a board member is fact-specific. Where there is no controlling authority or statute, "a practical feel for the situation" is often relevant." (*Friends v. Board of Educ.*–above) Most often, the determination of whether a board member should recuse himself from a discussion or a vote is self-policing.

21. Are prayers or moments of silence allowed at board meetings?

Courts seem to distinguish *Marsh v. Chambers* (463 U.S. 786) where the U.S. Supreme Court held that prayers before legislative sessions are constitutional. Significant in Marsh was that the legislative chaplain removed all references to Christ after the sectarian nature of his prayers was brought to his attention and (supposedly) the prayer did not advance any one faith or belief. *Courts in Coles v. Cleveland Board of Education* (171 F.3d 369, Ohio, 1999) and *Bacus v. Palo Verde Unified School Dist. Bd. of Educ.* (52 Fed. appx.355, California 1998) held that a sectarian prayer is unconstitutional and that a school-board setting is even more coercive to participating students than other school activities. Some boards of education reconcile the board's desire to formalize the beginning of their meetings (or pray) with the constitutional prohibition by designating a "reverence" or "inspirational thought" at the beginning of the meeting. The terminology seems to matter to the courts.

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AFFIDAVIT

The _____, at its regularly scheduled meeting on _____, met in an Executive Session for the purpose of discussing _____ only.

_____ _____

Signature Title